Supreme Court, U.S.
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No. 89-5295

OCTOBER TERM, 1989

JEROME MALLETT,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

Petitioner Jerome Mallett was convicted of first-degree murder, §565.020, RSMo 1986, in the Circuit Court of Schuyler County, Missouri, for which offense he was sentenced to death. Petitioner's conviction and sentence were affirmed on appeal by the Missouri Supreme Court. State v. Mallett, 732 S.W.2d 527 (Mo. banc), cert. denied, 108 S.Ct. 309 (1987). The facts surrounding movant's murder of a Missouri State Highway Patrolman, Trooper James M. Froemsdorf, are summarized in the initial Opinion of the Missouri Supreme Court, id. at 530-533, and will not be restated here.

On November 25, 1987, movant filed a post-conviction motion pursuant to Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988) in the Circuit Court of Schuyler County. After amendments to the motion, an evidentiary hearing was held on May 27, 1988. Following the hearing, the Circuit Court entered judgment vacating the conviction and sentence. The State appealed, and petitioner cross-appealed to the Missouri Court of Appeals, Western District. That appellate court transferred the cause to the Missouri Supreme Court. The Missouri Supreme Court reversed the judgment of the Schuyler County Circuit Court and ordered post-conviction relief denied. **Mallett v. State**, 769 S.W.2d 77 (Mo. banc 1989). The present petition for writ of certiorari ensues.

The facts relevant to petitioner's claims will be stated in respondent's argument, infra.

ARGUMENT

I. The Change-of-Venue/Equal-Protection Claim

Before petitioner's criminal trial, he filed a motion for change of venue from Perry County, Missouri, the county where the murder occurred. After petitioner and the State were unable to reach an agreement on which county should receive the case, Judge Murphy entered an order transferring venue to Schuyler County, Missouri. Mallett v. State, 769 S.W.2d 77, 79 (Mo. banc 1989). Petitioner now accuses Judge Murphy of violating his equal protection rights by transferring the cause to Schuyler County. Since petitioner failed to prove the existence of purposeful discrimination, McClesky v. Kemp, 481 U.S. 279 (1987), post-conviction relief was properly denied.

Petitioner attempts to shuck off his failure to sustain his burden of proof by suggesting that a different burden of proof should apply--a burden of proof based on Batson v. Kentucky, 476 U.S. 79 (1986) (Petition, p. 7). Initially, respondent submits this Court should decline to consider such a request because the request, if adopted, would be new law that would not be applied retroactively. See, Teague v. Lane, 109 S.Ct. 1060 (1989). Petitioner's conviction became final in October, 1987, with this Court's initial denial of a writ of certiorari. Mallett v. Missouri, 108 S.Ct. 309 (1987). There can be no doubt that application of the burden of proof outlined in Batson v. Kentucky to a change-of-venue issue would constitute new law which should not be applied retroactively. Under the Teague v. Lane doctrine, retroactivity is now a threshold issue. Since petitioner's requested new law would not be applied retroactively, further review of the issue is unwarranted.

In any event, the Missouri Supreme Court properly found Batson to be of "limited usefulness" in analyzing an equal protection claim concerning change of venue. Mallett v. State, 769 S.W.2d at 81. The Missouri Supreme Court also found that the factors in this case (Petition, pp. 7-8) fail to establish an inference of discriminatory

purpose when those factors are considered along with all of the relevant factors. Mallett v. State, 769 S.W.2d at 81.

It is significant that petitioner does not contend this issue is worthy of this Court's discretionary review under Supreme Court Rule 17.1. Petitioner does not articulate a conflict between the Missouri Supreme Court and any other state supreme court or federal court of appeals. Petitioner does not articulate any important question of federal law which has not been, but should be settled by this Court. Petitioner's request for certiorari review of the Missouri Supreme Court judgment is without merit.

II. The Due Process/Standard-of-Review Issue

Petitioner next alleges that the Missouri Supreme Court violated his due process rights by failing to employ the standard of appellate review articulated in Missouri Supreme Court Rule 27.26(j) (Petition, pp. 9-10). Whether the Missouri Supreme Court applied the proper standard of review is solely an issue of state law. A state's post-conviction procedure does not implicate federal constitutional rights. Murray v. Giarrantano, 109 S.Ct. 2765 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987). In particular, a post-conviction proceeding in Missouri does not implicate federal due-process concerns. See, Mitchell v. Wyrick, 727 F.2d 773 (8th Cir.), cert. denied, 469 U.S. 823 (1984); Williams v. State of Missouri, 640 F.2d 140 (8th Cir.), cert. denied, 451 U.S. 990 (1981). A ruling to the contrary would constitute new law and would not be retroactive. Accordingly, federal-court review of petitioner's claimed new law is barred under the Teague v. Lane doctrine.

CONCLUSION

In view of the foregoing, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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